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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. [redacted] 711

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL., - - - - - Petitioners,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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WESTERFIELD-DONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

October Term, 1961

No. _____

BROTHERHOOD OF LOCOMOTIVE ENGINEERS;

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN;

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN;

BROTHERHOOD OF RAILROAD TRAINMEN;

H. J. ROADCUP, Individually, and as General Chairman and representative of a class consisting of the members of the Brotherhood of Locomotive Engineers, an unincorporated labor union;

JAKE PASCHALL, Individually, and as General Chairman and representative of a class consisting of the members of the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated labor union;

L. G. MULINIX, Individually, and as General Chairman and representative of a class consisting of the members of the Order of Railway Conductors and Brakemen, an unincorporated labor union;

J. M. KING, Individually, and as General Chairman and representative of a class consisting of the members of Brotherhood of Railroad Trainmen, an unincorporated labor union, - - - - - - - - *Petitioners,*

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners, Brotherhood of Locomotive Firemen and Enginemen (BLF&E); its General Chairman on the Louisville and Nashville Railroad (L&N) system, Jake Paschall; Brotherhood of Locomotive Engineers (BLE); its General Chairman on the L&N system, H. J. Roadcup; Order of Railway Conductors and Brakemen (ORC&B); its General Chairman on the L&N system, L. G. Mulinix; Brotherhood of Railroad Trainmen (BRT); and its General Chairman on the L&N system, J. M. King, pray that a writ of certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit on December 18, 1961 (Petition for Rehearing denied January 17, 1962), which affirmed the judgment of the District Court of the United States for the Western District of Kentucky.

OPINIONS BELOW

The Memorandum Opinion of the District Court entitled "Order" (page 98a, Certified Record, hereinafter designated "Record")[1] is copied at page 1 of the Appendix to this Petition (hereinafter designated "Appendix"). The District Court's Findings of Fact and Conclusions of Law and Judgment (Record, page 134a; Appendix, page 2, *et seq.*) are reported in 190 F. Supp. 829. The Opinion of the United States Court of Appeals (Appendix, page 24, *et seq.*) is reported in 297 F. 2d 608 (Advance Sheet No. 4, March 5, 1962).

[1]Appendix to Petitioners' Brief in the United States Court of Appeals for the Sixth Circuit, certified as a part of the Record for use with this Petition.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The Judgment of the Court of Appeals sought to be reviewed (Appendix, page 24, *et seq*), 297 F. 2d 608, was dated and entered December 18, 1961. Petition for Rehearing, for Clarification and Extension of the Opinion (Appendix, page 27) was filed December 26, 1961, and denied by an Order made and entered January 17, 1962 (Appendix, page 31). The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C., §1254.

QUESTIONS PRESENTED FOR REVIEW.

1. Does the Railway Labor Act, in particular the provision regarding judicial enforcement of National Railroad Adjustment Board awards contained in Section 3, First (p) [45 U.S.C., Section 153, First (p)], deprive railroad employees of their common law right to strike for the purpose of compelling a railroad to settle a dispute after the dispute has been made the subject of an award by the Board in favor of employees but which has not been complied with by the railroad?

2. Does the Railway Labor Act prohibit strikes by employees over disputes with their employer concerning the correct application of an award made in favor of an employee by the National Railroad Adjustment Board?

3. In the circumstances stated in question No. 1, is the enforcement suit authorized by Section 3, First (p), the only remedy available to the employees, or

may the employees resort to a strike in an effort to induce the employer to accede to their contentions in the matter in dispute?

STATUTES INVOLVED.

The statutes involved are the Railway Labor Act (45 U.S.C., §151, *et seq.*) the pertinent portions of which are printed in the Appendix at page 31, *et seq.*; and the Norris-LaGuardia Act (29 U.S.C., §101, *et seq.*) the pertinent portions of which are printed in the Appendix at page 34, *et seq.*

STATEMENT OF THE CASE.

At all of the times hereinafter mentioned, Respondent, L&N a common carrier, as defined by the Railway Labor Act, operated its railroad system under contracts with the Petitioners, BLE&E, BLE, ORC&B and BRT, each of which unions is certified under the Railway Labor Act as the collective bargaining representative for its members employed by the L&N on its system. The individual Petitioners named herein are the General Chairmen of their respective unions on the L&N system. The various provisions of the union contracts, in railroad parlance, are generally referred to as "Rules", and each of the current contracts contains—as did every prior contract over a period of more than 40 years—a provision prescribing the procedure to be followed by the L&N when it determines to discipline by suspension, discharge or otherwise, an employee for misconduct in the performance of his duties, and also

prescribing the measure of liability or damage of the L&N to such employee if it is finally determined that such disciplinary action taken by the L&N was improper. That provision of the current BLF&E contract is designated as "Article 31", and is copied at page 37, *et seq.*, of the Appendix. The contract of each of the other three unions is in substantially the same language.

Paragraph (f) of Article 31 of the BLF&E contract provides:

> "If the discipline administered is not sustained, it will be cancelled and the fireman in question will be paid for any time lost by him resulting from the investigation or action taken" (Record, 73a; Appendix, page 38).

Each of the contracts with the other Petitioner unions contains a paragraph in substantially the same language (Record, 77a 80a; Appendix, page 38).

The L&N discharged B. G. Humphries, one of its firemen, on the charge that he had assaulted two other employees while engaged in the discharge of their duties. The resulting dispute over the discharge was processed without effect "on the property" up to the highest officer of the L&N designated to handle such matters. The L&N then submitted the dispute to the National Railroad Adjustment Board (Adjustment Board), as provided by §3, First (i) through (o), inclusive of the Railway Labor Act [45 U.S.C., §153, First (i) through (o)]. The Adjustment Board found that Humphries had been wrongfully discharged and

ordered that he be reinstated with pay for time lost "as the rule is construed on the property" (Record, 17a, *et seq.;* Appendix, page 39). The L&N restored Humphries to his former position, but declined to settle the money award for time lost except upon the basis of deducting from the amount which otherwise would be due him any earnings he had realized from outside sources during his layoff. The BLF&E rejected this proposal on the ground that it was in violation of Paragraph (f) of Article 31 of its contract. There was not then, and never has been, any agreement, express or implied, between the L&N and either of the unions here involved that Article 31(f) of the BLF&E contract or the corresponding provision in either of the other union contracts should be construed to authorize the deduction of outside earnings in computing the amount due on a money award in a discipline case, and no such deduction has ever been made (Record, 51a, 76a, 79a, 87a). The L&N made an attempt in 1945 and again in 1947, in the manner provided by §6 of the Railway Labor Act (45 U.S.C., §156, to amend Article 31(f) of the BLF&E contract and the corresponding provisions of the contract of each of the other three Petitioner unions so as to authorize the deduction of outside earnings, but without success (Record, 95a, *et seq;* 48a, *et seq.*).

Protracted negotiations were conducted between the L&N and BLF&E over the method of computing the amount of the award to Humphries, during the course of which the L&N announced that in addition to deducting outside earnings in computing the amount to

be paid on the Humphries award, it intended to make similar deductions in all future settlements of money awards in discipline cases affecting employees whether members of the BLF&E or of one of the other three unions. Thereupon, representatives of the other three unions also entered the negotiations, but no settlement was reached (Record, 39a, *et seq.*).

The L&N, in a second submission, made an effort to have the Adjustment Board reopen the hearing on the dispute originally submitted to it, and determine if the L&N was entitled to deduct Humphries' outside earnings. That effort was rejected by the Adjustment Board on the ground that the L&N not having raised the question in its original submission could not thereafter do so (Record, 44a, 68a; Appendix, page 41). Following that action of the Adjustment Board, negotiations were renewed without result, and the unions threatened to go out on strike. Thereupon, the L&N made a third submission to the Adjustment Board in which it was asked to interpret its award in respect to the L&N's right to deduct outside earnings on the theory that it was submitting a new controversy to the Adjustment Board (Record, 45a). While that submission was pending before the Adjustment Board, the four Petitioner unions called a strike, effective February 13, 1959. The L&N procured a temporary injunction against the strike on the ground that the dispute over which the strike was called was then pending before the Board (Record, 5a, 143a; Appendix, page 11). The jurisdiction of the District Court was invoked under the authority of the Railway Labor

Act, *supra*; the Interstate Commerce Act (49 U.S.C., §1, *et seq.*); and the Act of 1948 (28 U.S.C., §1331 and §1337). While the temporary injunction was in force, the Adjustment Board rejected the third attempted submission on the part of the L&N on the same ground on which the second submission was rejected (Record, 69a, Appendix, page 42). The dispute thus having been cleared from the docket of the Adjustment Board, the Petitioner unions moved the District Court that the temporary injunction theretofore issued be discharged on the ground that its continuance was not authorized by the Railway Labor Act and was prohibited by the Norris-LaGuardia Act (Record, 28a, *et seq.*). That motion was overruled, and the Court delivered an opinion entitled "Order" (Record, 98a; Appendix, page 1), and subsequently made Findings of Fact and Conclusions of Law and entered a Judgment ostensibly conforming to the Court's prior "Order" (Record, 134, *et seq.*; Appendix, page 2, *et seq.*).

Petitioners appealed from the Judgment of the District Court to the United States Court of Appeals for the Sixth Circuit, which affirmed the action of the District Court in a *per curiam* Opinion, adopting as its own the Conclusions of Law of the District Court (Appendix, page 24, *et seq.*). A Petition for Rehearing and for Clarification and Extension of the Opinion was filed in which the Court of Appeals was asked to state specifically if its opinion was based upon the premise (1) that the Railway Labor Act prohibits all strikes in minor disputes between a railroad company

and its employees; or (2) that the suit provided for by §3, First (p) of the Railway Labor Act for the enforcement of awards of the Adjustment Board is the exclusive remedy and recourse available to the employees and their unions and precludes all strikes for the purpose of enforcing the settlement of disputes which have been made the subject of awards favorable to employees (Appendix, page 27, *et seq.*). That Petition was denied without comment (Appendix, page 31).

REASONS FOR GRANTING THE WRIT.

The Judgment Rendered by the Court Below Should Be Reviewed by This Court Because It Decides an Important Question of Federal Law Affecting in a Serious Manner Employer-Employee Relations in the Railway Industry, Which Should Be Settled by This Court.

The question of Federal law decided by the court below is whether, after the National Railroad Adjustment Board has issued an award in favor of railway employees and the carrier chooses to not make the award effective, either in part or in whole, the employees may seek to re-establish negotiations with the carrier to settle the dispute, using economic force if necessary in order to reach an acceptable settlement.

The decision rendered below declares that the so-called enforcement procedure in the Federal courts, authorized by Section 3, First (p), of the Railway Labor Act (45 U.S.C., Sec. 153, First (p)), is the only lawful means by which railway employees may seek to compel their employer to settle the dispute upon which the award is based. These Petitioners do not believe that the Congress intended to deny railway employees the use of the collective bargaining process as a means of compelling their employer to agree to the settlement of grievances[1] either prior to the submission of the dispute to the Adjustment Board or subsequent to the

[1]The term "grievances" as used in this petition refers to Adjustment Board awards in favor of employees, claims for additional compensation, for reinstatement to employment, and to other disputes growing out of the interpretation and application of collective agreements.

issuance of an award by the Adjustment Board in favor of the employees and after the employer has declined to make the award effective.

The judgment rendered by the court below, if it stands, represents the last step in bringing to full fruition an astutely managed plan to gradually supplant a national policy established by Congress governing employer-employee relations, with a new national policy established through a series of court decisions which, proceeding step by step, now effectively nullifies the right of employees to employ their economic strength to achieve settlement of disputes involving grievances which generally turn upon the proper interpretation and application of collective agreements. The goal of the Congressional policy which threatens to be supplanted by Federal court decisions was stated by this Court in *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U. S. 283, at 295, in the following manner:

> "The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, *is the promotion of collective bargaining;* to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations and thereby to minimize industrial strife." (Emphasis ours.)

The same Congressional policy is stated in the "General Purpose" provisions of the Railway Labor Act (45 U.S.C., Sec. 151a (1)) and by this Court in

Brotherhood of Railroad Trainmen v. *T.P. & W. RR. Co.*, 321 U. S. 50.

No one is likely to venture so rash a conclusion as to assert that the original Railway Labor Act, enacted May 20, 1926 (44 Stat. L. 577), deprived railway employees of the right to exert economic pressure upon their employer when negotiating the settlement of disputes based upon grievances.

When Congress, by its 1934 amendments to the Railway Labor Act, established the National Railroad Adjustment Board with authority to entertain and decide disputes growing out of grievances, and also authorized employees to invoke the power of the Federal courts against carriers who decline to comply with Adjustment Board awards (45 U.S.C., Sec. 153, First (i) and (p)), it omitted from these amendments simple language, which could easily have been included, stating that thereafter railway employees may *not* use their organized strength when negotiating the settlement of grievances. After enactment of the 1934 amendments, railway employees and the organizations representing them continued to believe that Congress, although it had provided more positive means of settling disputes by the establishment of the National Railroad Adjustment Board, had no intention of depriving railway employees of their existing right to resort to strike action when such action appeared to them necessary in order to persuade management to satisfactorily dispose of accumulated dockets of grievances. For some fifteen years thereafter railway employees and the unions representing them, and the

carriers, conducted their relations on the basis of this understanding of law.[1]

[1]For example, the National Mediation Board's report to Congress for the year ending June 30, 1960, included the following observations:

"For a number of years the Mediation Board has found it necessary to proffer mediation services as a means of avoiding threatened work stoppages on carriers where a large number of grievance disputes have accumulated. The extent to which mediation efforts in such instances have reduced the total number of mediation settlements is indicated by comparing the total mediation settlements during the five postwar years. In 1945 and 1946 the total number of mediation settlements were 359 and 379, respectively. It was at about that time that the train and engine service organizations showed a growing tendency to set strike dates on grievance dockets which should normally be referred for settlement to the First Division of the National Railroad Adjustment Board. This policy of the organizations has been continued despite repeated statements by the National Mediation Board as well as numerous emergency boards that such action tends to weaken the basis principles of the Railway Labor Act. During the years subsequent to 1946, without any reduction in the number of mediators, the number of mediation settlements has shown marked declines (p. 28). * * *

"Some of the organizations have withdrawn cases pending before the (First) Division and declined to submit new cases, preferring to secure settlements by direct handling with the carrier management. Where such negotiations fail, strikes are sometimes threatened, thereby creating labor emergencies under provisions of Section 5, first, of the act. In such cases, the National Mediation Board, in an effort to prevent interruptions to commerce, proffers its mediation services. As in previous years there were numerous situations of this kind during 1959. A great amount of time of the Board and its mediators was spent in preventing strikes in such situations. Time spent endeavoring to mediate disputes of this type is at the expense of regular mediation cases. Where efforts to settle grievance disputes by mediation were unsuccessful, emergency boards were created by the President under provisions of section 10 of the act as a means of averting threatened strikes. During the past year 6 of the total of 11 presidential emergency boards named were created to investigate threatened strikes over grievance disputes which, under the law, should properly be disposed of by the First Division.

"In addition, one of the most costly strikes in the history of American railroading resulted from one of those disputes. That strike involved one of the Nation's larger rail carriers, *i. e.*, the Missouri Pacific Railroad Co., and caused a shut-down in operations of this carrier for a period of 45 days" (p. 24).

By 1950 the fact became apparent that the railroads had embarked upon a program designed to strip railway employees of the use of their economic power when negotiating settlements of grivances. The railroads' first effort took the form of strong support by railroad officials of S. 3463 during hearings before the Subcommittee on Railway Labor Act Amendments of the Committee on Labor and Public Welfare, United States Senate, Eighty-first Congress, Second Session. This bill, known as the Donnell Bill, proposed amendments to the Railway Labor Act. Section 10A of the bill proposed to outlaw the right of railway employees to engage in strikes by declaring—

> "Any strike, including any concerted stoppage of work by employees or any concerted slow-down, walkout, or other concerted interruption of operations by employees, or any lock-out by a carrier, arising out of or in connection with any dispute falling within the purview of this Act, shall be unlawful."

The full Committee on Labor and Public Welfare reported the Donnell Bill unfavorably, and the Bill was doomed (Report No. 2445).

Management then turned to the Federal courts to achieve what it failed to obtain from Congress. On March 26, 1954, Kansas City Terminal Railway Company filed suit in a Missouri state court against its engineer and firemen employees praying for temporary and permanent injunctions to prevent its employees from striking. A docket of some 2,000 claims and

grievances had been filed by the employees against the Terminal because of the Terminal's insistence that its employees work overtime, contrary to a rule relieving employees from overtime work except when emergencies arose. The Terminal refused to settle the claims and grievances, and the enginemen resolved to strike. Neither the Terminal nor the employees submitted the grievances to the National Railroad Adjustment Board. (*Kansas City Terminal Railway Co.* v. *Manion* (Mo.) 290 S. W. 2d 63.)

The Terminal predicated its claim to injunctive relief on two independent grounds, one ground being the contention that there is but one means by which railway employees may undertake to compel carriers to satisfy their claims and grievances. This one means is to submit such disputes to the Adjustment Board. Terminal asserted that—

> "* * * a strike to coerce settlement of such lesser disputes has for the general public good and in the interest of labor peace been forbidden by the Railway Labor Act." (297 S. W. 2d 31, 33.)

The injunction was issued as prayed for, and the case finally reached this Court on certiorari (353 U. S. 927.)

Shortly after the action by Kansas City Terminal was instituted, another suit was filed by the Chicago River & Indiana Railroad Company and 27 other Class I railroads to enjoin a threatened strike by trainmen employees of the C.R. & I. Railroad. The threatened strike grew out of a dispute over 21 claims

and grievances which C.R. & I. refused to dispose of by negotiation. The only significant difference between the factual situation in the *Chicago River* case and the *Kansas City Terminal* case was that the claims and grievances which led to the threatened strike in the *Chicago River* case were submitted to the Adjustment Board after the setting of the strike date but before the strike began, whereas the time claims and grievances in the *Terminal* case had not been submitted to the Adjustment Board.

The ground upon which the prayer for injunctive relief was sought in the *Chicago River* case was precisely the same as formed the basis for the injunction in the *Terminal* case.[1] It was stated by the Court of Appeals, Seventh Circuit, as follows:

> "Plaintiffs say that it is mandatory under the Railway Labor Act that minor disputes be adjusted instead of being made the subject of a strike. They contend that such command must be enforced, even though the act itself does not provide enforcement machinery, and that an injunction is appropriate to this end" (229 F. 2d 926, 929).

This Court affirmed the injunction that had been issued against the trainmen in the *Chicago River* case. Petitioners do not read the decision of this Court in that case as affirming the carriers' thesis that railroad employees may seek to compel the disposition of griev-

[1]This Court ordered that the injunction issued by the Missouri state court in the *Terminal* case be vacated. The decision by this Court is discussed in a later part of this statement of the reasons why certiorari should be granted in this case.

ances only by submitting them to the National Railroad Adjustment Board.

Petitioners read the *Chicago River* decision as holding that the launching of a strike over a dispute while the dispute is pending before the Adjustment Board must be considered unlawful, and hence may be enjoined, because the strike would have the practical effect of defeating the jurisdiction of the National Railroad Adjustment Board under Section 3, First (i), of the Railway Labor Act. That a strike would have the practical result of defeating the exercise by the Adjustment Board of the authority vested in it by Congress cannot be doubted. However, the submission of a dispute by the carrier to the Adjustment Board has the effect of putting the dispute "on ice" for a period of some five years.[1] In the interim, the wage rates or working rules involved in the dispute are interpreted and enforced according to management's views and the employees must simply resign themselves to this state of affairs, or, in the alternative, quit their employment and hunt for new jobs.

The next logical and strategic step in curtailing the use by railway employees of their organized strength was to prevent its use in connection with efforts to settle disputes growing out of grievances *after* the Adjustment Board has concluded its jurisdiction over the dispute.

The carriers face no problem when the Board's award is *adverse* to the employees. Railway em-

[1]Twenty-seventh Annual Report of the National Mediation Board, p. 87, Table 9, for the fiscal year ended June 30, 1961.

ployees have consistently refrained from attempting to overcome *adverse* Adjustment Board awards by subsequently insisting upon settlement of such disputes with the aid of economic pressures.[1]

A decidedly different situation exists when Adjustment Board awards are *in favor* of employees and the carrier decides to adhere to its original position in the dispute. Under such circumstances the rights of the parties have not been altered, in a practical sense, by the award. There remains a dispute to be settled. And the employees have always taken the position that the dispute may again be made the subject of negotiations looking toward settlement, with or without the use of economic forces as the occasion requires.

To escape the latter situation, carriers have recently taken the position that negotiation on behalf of employees under these circumstances, with the aid of economic force, is forbidden by the Railway Labor Act. Carriers take the position that if they elect not to make the award effective, the dispute is at an end, unless the employee or employees whose grievances were sustained by the award resort to an enforcement suit in a Federal court under the procedural conditions defined in Section 3, First (p), of the Railway Labor Act (45 U.S.C., Sec. 153, First (p)).

In short, the carriers' contention is that Congress intended that resort to litigation in the Federal courts should be an exclusive method, the one and only means,

[1]This policy on the part of employees is prompted by substantially the same considerations that this Court based its decision upon in *Union Pacific Railroad* v. *Price*, 360 U. S. 601.

whereby grievances may be satisfied after they have been made the subject of an Adjustment Board award favorable to the employee and the carrier chooses to adhere to its original refusal to satisfy the grievance.

This is precisely the view of the law adopted by the United States Disfriet Court for the Western District of Kentucky, and by the United States Court of Appeals for the Sixth Circuit, in the instant case. The decisions rendered by the courts below are superficial treatments of the problem, and they were manifestly influenced by the earlier decisions rendered by the United States District Court for the District of Colorado (185 F. Supp. 369) and by the United States Court of Appeals for the Tenth Circuit (290 F. 2d 266), in the case entitled *Denver & Rio Grande Western R.R. Co.* v. *Brotherhood of Railroad Trainmen* (Certiorari denied, 366 U. S. 966).

The decisions rendered in the instant case by the courts below, unless this Court grants certiorari and reverses, mark the successful completion of the carriers' campaign to obliterate the legal right of railway employees to employ their organized strength in the course of negotiating settlements of grievances growing out of the interpretation and application of collective agreements.[1]

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[1]Further progress in the erosion, through the judicial process, of existing rights of railway employees to employ their economic strength as a part of the collective bargaining process is now well under way in the field of negotiating agreements governing wages and working conditions. In *Chicago, Rock Island & Pacific RR.* v. *Switchmen's Union*, 187 F. Supp. 581, the carrier sought and obtained an injunction preventing its switchmen employees from

(*Footnote continued on following page*)

The motive prompting the filing of this petition for certiorari is the desire of Petitioners to make certain this Court is aware of the basic change wrought in the law regulating employer-employee relations in the railway industry by the decisions rendered by the courts below in the instant case and by courts of the Tenth Circuit in *Denver & Rio Grande Western Ry.* v. *Brotherhood of Railroad Trainmen;* and to suggest to this Court that so profound a change in what was considered to be the law prior to that litigation ought not to occur without this Court affirming the judicial necessity for such pronouncement.

This basic change in the policy of the law regulating a large area of employer-employee relations in the

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engaging in a strike in the course of bargaining over a request for an increase in rates of pay. The carrier contended that the strike would violate the Railway Labor Act because the switchmen's representative merely went through the motions of collective bargaining before announcing that the switchmen intended to strike, and hence they had failed to "exert every reasonable effort to make and maintain agreements" as required by Section 2, First, of the Railway Labor Act. (45 U.S.C., Sec. 152, First.) (Findings of fact reversed, 292 F. 2d 61; petition for certiorari filed and pending.)

In *Elgin, Joliet & Eastern Ry. Co.* v. *Brotherhood of Railroad Trainmen*, 196 F. Supp. 158, the carrier sought to enjoin its enginemen and trainmen employees from engaging in a strike after trying over a period of one and one-half years to negotiate a new pension agreement. A temporary injunction against the strike was issued, but was dissolved after a trial on the merits. The carrier appealed and the case is now awaiting decision by the Court of Appeals, Seventh Circuit. The carrier based its claim to injunctive relief on the argument that if employees refuse to arbitrate a dispute when arbitration is proffered by the National Mediation Board, a strike based upon the dispute would violate the Railway Labor Act, because the employees failed to exert every reasonable effort to reach an agreement. The authority for this proposition is found, according to the E. J. & E. Ry., in the decision by this Court in *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W.R. Co.*, 321 U. S. 50.

railway industry amounts to practically outlawing the use of economic weapons by employees when negotiating with railroad managements for the settlement of grievances growing out of the interpretation and application of collective agreements. The outlawing of the use of economic weapons by employees in this connection has the inevitable effect of destroying the collective bargaining process. And with the loss of this process goes the most effective method available for maintaining peaceful relations and a productive relationship between employers and employees.

This Court is aware that there can be no effective collective bargaining where one party is a group of employees who have only their labor to sell and who are prohibited by law from jointly withholding their labor until acceptable terms of employment are offered or grievances are satisfactorily resolved. Bargaining on behalf of employees without power to withhold collectively their labor is a thoroughly futile process. Bargaining under such conditions can amount to no more than a form of supplication. This Court stated as much in the *Chicago River* case when it made this observation:

> "The Norris-LaGuardia Act, on the other hand, *was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining*" (353 U. S. 30, at 40).

In *N. L. R. B. v. Insurance Agents' Int. Union*, 361 U. S. 477, this Court gave a classical disquisition

on the relationship between the collective bargaining process and the possession of economic power by the bargaining parties:

> "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side. One writer recognizes this by describing economic force as 'a prime motive power for agreements in free collective bargaining.' Doubtless one factor influences the other; there may be less need to apply economic pressure if the areas of controversy have been defined through discussion; and at the same time, negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess" (361 U. S. 477 at 489).

There can surely be no serious doubt about the truth of the conclusion that if the decisions by the courts below stand, then collective bargaining will cease

to be a method by which carriers and their employees undertake to accomplish one of the major objectives in the mind of Congress when it enacted the Railway Labor Act. This objective was "the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions" (45 U.S.C., Sec. 151a (5)).

This development, this loss of the collective bargaining process, will also conflict squarely with a basic principle, repeatedly enunciated by this Court, upon which the welfare of a society, founded upon the principles of individual liberty and a competitive system of free enterprise, is best served and best preserved. An explanation of this principle was perhaps first stated on behalf of this Court by Mr. Chief Justice Taft in the case of *American Steel Foundries* v. *Tri-City Trades Council*, 257 U. S. 184:

> "Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and his family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert

influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has, in many years, not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share of division between them of the joint product of labor and capital" (257 U. S. 184, at 209).

The cardinal importance of the collective bargaining process to the successful functioning of our system of free enterprise and the preservation of a society founded upon a philosophy of individual liberties has been reaffirmed by this Court on many occasions. The following decisions are examples:

N. L. R. B. v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, at 33.

Republic Steel Corp. v. *N. L. R. B.*, 311 U. S. 7, at 10.

Dodge Corp. v. *N. L. R. B.*, 313 U. S. 177, at 183.

Brooklyn Sav. Bank v. *O'Neil*, 324 U. S. 697, at 706.

Local 1976, United Bro. of Carpenters v. *N. L. R. B.*, 357 U. S. 93, at 99.

Local 24 of Int. Bro. of Teamsters v. *Oliver*, 358 U. S. 283, at 295.

Union Pacific RR Co. v. *Price*, 360 U. S. 601, at 609.

Management is now able to effectively quash any threat of a strike from discontented employees when

the discontent is caused by managements' rejection of their grievances. The method is simply to submit the dispute to the Adjustment Board a moment before the employees leave their employment in a strike. Except for prompting the carrier to submit the dispute to the Adjustment Board, the threat to strike under these circumstances, of course, has become a futile gesture.

If the decisions rendered by the courts below become established law, the alternative courses of procedure available to railway employees in handling disputes "growing out of grievances or out of the interpretation and application of agreements covering rates of pay, rules, or working conditions" are obvious.

One course of action open to the employees is to simply live with their grievances. What this will lead to need not be the subject of speculation here.

The alternative to this course of action is equally clear. This is for employees to submit their grievances to the Adjustment Board, or cause the employer to make the submission by threatening to strike. This puts the dispute in cold storage. Nothing more can be done about the dispute than to wait for the passing of four or five years while the submission takes its turn on the docket of the Adjustment Board for decision. In the meantime, if the dispute involves a question of the proper interpretation or application of a rule of employment in a collective agreement, management is at liberty to require the employee to work subject to the employer's views regarding the manner in which the rule shall be interpreted and applied.

When the dispute is finally decided by the Adjustment Board, and assuming the decision is adverse to the employee, the dispute is thereby at an end.

If the Adjustment Board's decision is in favor of the employee, the effort by the employee to secure satisfaction of the grievance may have only seriously begun. For if management was satisfied at the inception of the dispute that its interpretation or enforcement of the working rule was proper, or that the penalty imposed upon the employee or the discharge of the employee was justified, the carrier is guilty of no wrong if it chooses to disregard the award and adhere to its original position in the dispute.

The propriety of the carrier assuming this attitude was an issue in the case of *Washington Terminal Co.* v. *Boswell,* 124 F. 2d 235. (Affirmed by an equally divided Court, 319 U. S. 732). It became an issue because of the contention urged by Washington Terminal that carriers should have the right to test the validity of Adjustment Board awards, rendered in favor of employees by instituting declaratory judgment proceedings in the courts. This method of judicial review of Adjustment Board awards should be available to carriers, the argument went, because railway employees adhere to a policy of not resorting to the courts for the settlement of disputes sustained by Adjustment Board awards, but prefer to negotiate and use their economic strength when they deem it necessary.

The Court of Appeals for the District of Columbia, speaking through Associate Justice Rutledge, rejected

the Terminal's contention that an unenforced Adjustment Board award is prejudicial to the carrier in a legal sense and the carrier should be permitted to test the validity of the award in a declaratory judgment proceeding. The discussion by the Court of Appeals of this issue is relevant to the proposition of law established by the decision rendered by the courts below:

> "The only purpose of such a suit would be to set aside or nullify the award. But this is not necessary for adequate protection of the carrier's rights. *The award is not self-enforcing or enforceable by the Board. It is merely a decision that the carrier should change its operating practice in the manner specified. It has the power of management and if it regards the award as contrary to its rights it can maintain the existing practices.* The Act confers upon the employer the powerful advantage of defensive position in respect to the award. It places the burden of enforcement upon the employee. It limits the time within which he may act. The period allowed is not unreasonable. If he does not act within it, presumably his right to do so is gone. If not, he loses at any rate the special advantages of the statutory suit.
>
> "In all this there is no essential unfairness. Certainly there is none beyond the power of Congress to create in the regulation of such complex economic matters. *The carrier is at full liberty to accept and comply with the award, or to reject and disregard it. If it chooses the latter course, the award has no effect upon its rights unless the*

employee institutes and succeeds in a suit to enforce it. If he does so, the carrier receives full constitutional protection in the suit.

"A further argument remains. It is that unless the carrier can maintain such a suit as this, the employees will elect not to institute enforcement suits, but to rely upon their economic bargaining power, that is, the right to strike, to secure enforcement or acceptance of awards. Thus, it is said, the carrier will be deprived of its day of defense, and so of its only day in court. It is urged that the court should look at the facts of industrial and railroad life and determine the effects of the statutory provision for suit in their light. If that is done, the further fact cannot be ignored that carriers, as well as labor unions and employees, have economic bargaining power. They are not entirely defenseless in the face of threat of strike. Nor are railroad strikes so easily and readily called and put in effect that they are everyday occurrences. Employees, as well as employers, have a stake in avoiding them. And there is elaborate provision in Section 2 of the Act for meeting the contingency of a strike. * * *

"Finally, even if the argument were more persuasive factually, it is hardly sufficient to establish the unconstitutionality of the legislation. *The Railway Labor Act was designed, not to outlaw the right to strike, but merely to prevent the necessity for its exercise.* That it has done, as the results attest. The argument assumes that a strike, or threat of one, to secure acceptance of an award would be unlawful. That it would be so has not been established, and the question need not now be determined" (126 F. 2d 235, at 246). (Emphasis ours.)

Section 3, First (m), of the Railway Labor Act appropriately implements the Congressional hope that carriers and their employees will treat Adjustment Board awards as "final and binding" ("except in so far as they contain a money award," which they often do when in favor of the employee). But not even the respondent to this proceeding will be heard to question the correctness of the conclusion expressed in the *Washington Terminal* case to the effect that an award "*is not self-enforcing or enforceable by the Board,*" and that if the carrier "*regards the award as contrary to its rights, it can maintain the existing practices.*"

Not only may the carrier disregard the award and "maintain its existing practices," the carrier actually will have a compelling incentive to refuse to give effect to adverse awards issued by the Adjustment Board in the event the decisions rendered by the courts below become established law. The carrier will know that it is protected against the use of economic force in the negotiating process following the issuance of an award in favor of the employee. The carrier will further know that the odds against being forced to make the award effective in an enforcement suit are preponderantly in its favor.

To resort to an enforcement suit, the employee must obtain the services of a lawyer. The filing of the suit means that the employee must endure another delay of one, or more likely two, years before the claim will be paid or the grievance rectified. And at the end of this period the grievance will be satisfied only if the

employee succeeds in demonstrating that his grievance *contains the essentials of a cause of action measured by common law standards.* In short, the employee must demonstrate to the satisfaction of the Federal courts that his grievance rests upon a legal right, recognizable by legal standards, that the right has been violated by the employer, and that the employee has in consequence suffered legal damages. This is precisely the burden of litigation the employee would have borne had he simply by-passed the Adjustment Board procedure, with its several years of delay, and resorted to suit in the courts promptly after his grievance arose, save for the one circumstance that in an enforcement suit the initial burden of proof is shifted to the carrier.

The prospect for railway labor relations that looms ahead, if the decisions rendered below stand, would not appear quite so bleak to railway employees if awards issued by the National Railroad Adjustment Board possessed a degree of finality comparable to that accorded arbitration awards by the common law or by the arbitration provisions of the Railway Labor Act (45 U.S.C., Sec. 157) or by the arbitration acts enacted by state legislatures.[1]

This Court cannot fail to appreciate the fact that an award issued by the Adjustment Board in favor of

[1]This statement is not intended to imply that railway employees would favor the establishment by law of a true compulsory arbitration process for the settlement of employer-employee disputes, for such method is antithetic to individual liberty and the institution of private enterprise.

an employee cannot and does not resolve or settle the legal rights of the parties to the dispute, unless the carrier should elect to accord the award this effect. If the carrier chooses *not* to be bound by the award, the employee gains nothing and takes nothing by the award. A true arbitration award, on the other hand, is as effective in conclusively determining the rights of the parties to the dispute as is a judgment rendered by a court of law. A true arbitration award has the additional advantage over an Adjustment Board award of being conclusive and binding of the rights and duties of the parties regardless of whether the party in whose favor it is made had a legal cause of action with respect to the matter submitted.[1]

The statement has been made that Adjustment Board proceedings are considered to be "compulsory arbitration" procedure in the area of the Board's jurisdiction. If Adjustment Board procedure is referred to as "compulsory arbitration" only in the sense that the Board's authority can be invoked by *one* party to a dispute without consent by the other party, the term is correctly used. But if this term is meant to imply that the Board's award, *when in favor of the employee*, is conclusive of the rights and duties of the carrier in a manner or degree approximating that of an award issued by arbiters under a statutory plan of "compulsory arbitration," or pursuant to an agreement governed by common law principles, the implication thus intended is not supportable. *Chas. Wolf Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522.

[1] 3 Am. Jur., Arbitration and Award, Sec. 130, page 951 et seq.

Petitioners believe they are rightfully representing to this Court that the decisions rendered by the courts below involve a serious question of Federal law. Petitioners believe that termination of the right of railway employees, through the effect of the court decisions below, to negotiate with management for the settlement of grievances with the "presence of economic weapons in reserve and their actual use on occasion," ought not become a *fait accompli* without this Court first satisfying itself that this legal right, which railway employees have considered invaluable and have used over a period of 25 years, did not in fact exist as a legal right, because the Congress determined, when amending the Railway Labor Act in 1934, that such right should no longer exist.

The Court Below Has Decided a Federal Question in a Way in Conflict With Applicable Decisions of This Court.

In the case of *Manion* v. *Kansas City Terminal*, 353 U. S. 927, the Terminal petitioned a Missouri state court to issue an injunction forbidding Terminal's engineers and firemen to engage in a strike in support of efforts by their craft representative to negotiate a settlement of 1,114 engineers' and 1,069 firemen's time claims. The time claims were based upon Terminal's insistence that its employees work overtime after completing a day's work of eight hours in the Terminal's yards. The Terminal's demands were contrary, the employees believed, to a provision in the employees' collective agreement by which Terminal agreed not to

request employees to work overtime except under emergency conditions.

The Terminal contended it was entitled to the protection of an injunction because the strike would be a violation of the Railway Labor Act. The Kansas City Court of Appeals summarized the Terminal's contention by saying:

> "Tersely stated, plaintiff asserted it was entitled to the Injunction on two grounds: (A) The Railway Labor Act prohibits a strike to force payment of time claims. It contends that time claims are 'minor disputes,' as contrasted with, for example, an effort to enforce collective bargaining demands, or write a new basic contract, either of which would be a 'major dispute,' to secure adjustment or settlement of which, a strike would be a proper procedural weapon." (297 S. W. 2d 31, at 33).

A permanent injunction forbidding the strike was issued on the basis of the law being as the Terminal claimed.

The case ultimately reached this Court on certiorari, and, by a *per curiam* opinion, this Court ordered the judgment of the Kansas City Court of Appeals vacated.

This ruling, Petitioners believe, implies an outright rejection of the contention advanced by Terminal. It refutes the deduction that the Congress must have intended to outlaw the right of railway employees to strike over grievances simply because it saw fit to make available to carriers and their employees the

administrative machinery of the Adjustment Board for the settlement of grievances.

This conclusion regarding the holding of this Court in the *Kansas City Terminal* case means that railway employees may lawfully employ their economic strength when negotiating settlements of grievances, except when, as in the *Chicago River* case, such action is a direct interference with the exercise of an essential right given to carriers by the Railway Labor Act.

The decision of this Court in the *Kansas City Trminal* case, as thus understood by the Petitioners, was not followed by the courts below when they rendered their decisions in the instant case.

The conclusion of law upon which the decisions rendered by the courts below rests is precisely the same conclusion of law upon which the Missouri State Courts rested their decisions in the *Kansas City Terminal* case. Hence, the decisions rendered by the courts below are inconsistent in principle with the decision by this Court in the *Kansas City Terminal* case.

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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